MONTANA SECRETARY OF STATE

LINDA McCULLOCH

MEMORANDUM

TO: Linda McCulloch
            Secretary of State

FROM: Jorge Quintana
            Chief Legal Counsel

            Jeanne Wolf
            Paralegal

DATE: March 20, 2012

RE: **Libertarian Party Ballot**

Question Presented

Should the Secretary of State, pursuant to Mont. Code Ann. § 13-10-209, certify the names of the Libertarian Party candidates for the general election ballot only?

Discussion

The Secretary of State's duty with regard to certifying the names of the candidates for a political party in a primary election is set forth in Mont. Code Ann. § 13-10-209(3), Arrangement and preparing of primary ballots, which states as follows:

> (3) If, pursuant to subsection (2), in a primary election held under13-1-107(1) a primary ballot for a political party is not prepared, *the secretary of state shall certify that a primary election is unnecessary for that party and shall instruct the election administrator to certify the names of the candidates for that party for the general election ballot only* (emphasis added).

According to subsection (2) of Mont. Code Ann. § 13-10-209:

> An election administrator does not need to prepare a primary ballot for a political party if:

> (a) the party does not have candidates for more than half of the offices to appear on the ballot; or

> (b) no more than one candidate files for nomination by that party for any of the offices to appear on the ballot.

1

At first glance, the statute being worded as a negative action preceding the disjunctive "or," is confusing. The statute states that a primary ballot does not need to be prepared if either subsection (a) or (b) occurs. Therefore, according to the plain language of subsection (2), an election administrator does not need to prepare a primary ballot for a political party if either of the events (a) *or* (b) occur.

In the present situation, (b) has not occurred as more than one candidate has filed--two Libertarian Party candidates have filed for the U.S. Senate. That leaves (a) to consider. Subsection (a) is, in effect, a simple mathematical computation. The condition occurs if "the party does not have candidates for more than half of the offices to appear on the ballot." A review by the SOS elections staff of all the candidates filing for partisan offices compared to the number of offices to appear on the ballot in the counties determined that the Libertarian Party did not have candidates in any county for more than half of the offices to appear on the ballot.

Therefore, since the requisite condition in (a) has occurred, that is, the party does not have candidates in more than half of the races on the ballot, the Secretary of State must instruct the election administrators to certify the names of the Libertarian Party candidates for the general election ballot only.

While the wording of the statute may appear confusing, the legislative intent is clear. In 2005, the Montana Legislature amended Mont. Code Ann. § 13-10-209 by removing the word "and" in subsection (2)(a) and inserting the word "or." This amendment in the words of the committee chair was a "substantive change."

Testimony from the hearing on House Bill 177 addressed this change as follows:

> Chairman Jent: So it eliminates the requirement, it's an "or" instead of a both. For when you don't have to prepare a Green Party ballot. If you've only got a Green Party guy running for a couple of offices or there's no opposition. Otherwise, the problem was, Elaine could you maybe help me there? The problem was that if you had a Green Party candidate or a Constitution Party candidate for one office, you had to prepare a primary ballot for all offices for the Constitution Party.

> Elaine Gravely, Election's Deputy for Secretary of State Brad Johnson: Mr. Chairman, that's correct. This will make it so that it's either or. They have to meet one or the other criteria instead of having to meet both. Because otherwise, if there is, for example, if it's the Constitution Party and if it had five candidates for governor, but they did not have candidates to field half of the offices, that party would then not be on the primary, they would have to go right to the General. This will make it so it's "or."

House Committee on State Administration, January 20, 2005.

The testimony speaks for itself.

It is a basic maxim of jurisprudence that the Legislature does not perform useless acts. Mont. Code Ann. § 1-3-223. The intention of the Legislature is to be pursued if possible. Mont. Code Ann. § 1-2-102. An interpretation that gives effect is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage. Mont. Code Ann. § 1-3-232. *See also, American Linen Supply Co. v. Department of Revenue*, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980). Deference must be given to the Legislature's intent in the interpretation of statutes. There can be no doubt that the Legislature intended to change the statute in question. The Legislature purposefully made the substantive change from "and," meaning both events had to occur to an "or," obviously meaning that only one of the two events had to occur.

Also persuasive in making this conclusion is an internal e-mail from Alan Miller, SOS Election Specialist, to the then SOS Election Deputy, outlining concerns from a lobbyist discussing the bill at issue. The e-mail states that "[i]f we use 'or,' as proposed in HB 177, it is more likely that multiple candidates from one party will end up on the general election ballot."

Based upon the plain reading of the legislative change of the word "and," which meant that both conditions needed to occur to trigger the event of not preparing a primary ballot, it is difficult if not impossible to now argue that the "or" requires both conditions to once again be met. Since one condition has occurred, it triggers the certification of the names of the candidates for the general election ballot only.

Conclusion

The action of the Legislature in changing Mont. Code Ann. § 13-10-209 by removing the word "and" in subsection (2)(a) and inserting the word "or" must be given deference and meaning. To require that both conditions in Mont. Code Ann. § 13-10-209 must occur would ignore the legislative intent to not print primary ballots if either of the events contemplated occurred. One of the events has occurred. The Secretary of State should, pursuant to Mont. Code Ann. § 13-10-209(3), certify that a primary election is not necessary and instruct the election administrators to certify the names of Libertarian candidates, including both Libertarian Party candidates for U.S. Senate for the general election ballot only.